

2. National Cooperative Research and Production Act of 1993¹

a. Purpose and Policy

The National Cooperative Research and Production Act of 1993 ("NCRPA" or "Act"), 15 U.S.C. §§ 4301-06, is designed to promote innovation, facilitate trade, and strengthen the competitiveness of the United States in world markets by (1) clarifying the applicability of the rule of reason standard to the antitrust analysis of joint ventures and standards development organizations ("SDOs") while engaged in a standards development activity, (2) providing for the possible recovery of attorneys fees by joint ventures and SDOs that are prevailing parties in damage actions brought against them under the antitrust laws, and (3) establishing a procedure under which joint ventures and SDOs that notify the Department of Justice and Federal Trade Commission ("FTC") of their cooperative ventures and standards development activities are liable for actual, rather than treble, antitrust damages. However, this damage limitation provision does not apply to a joint venture's production of a product, process, or service unless (1) the principal facilities for such production are located in the United States or its territories, and (2) each person who controls any party to such venture (including such party itself) is a United States person or a foreign person from a country whose law accords antitrust treatment no less favorable to United States persons than to such country's domestic persons with respect to participation in joint ventures for production.²

The legislative history of the NCRPA indicates that the phrase "whose law" is intended to include "not only a country's domestic antitrust law but also all international agreements and other binding obligations to which that country and the United States are parties."³ Thus, a country that is a party to certain international agreements with the United States such as treaties of Friendship, Commerce and Navigation, Bilateral Investment Treaties, Free Trade Agreements, and various OECD instruments, satisfies the requirements of the Act.⁴ This includes most countries.

¹ The National Cooperative Production Amendments of 1993, Pub. L. No. 103-42, amended the National Cooperative Research Act of 1984, Pub L. No. 98-462, renamed it the National Cooperative Research and Production Act of 1993, and extended its provisions to joint ventures for production. The Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, extended the provisions of the NCRPA to standards development organizations.

² See 15 U.S.C. § 4306.

³ H.R. Rep. No. 103-94, at 20 (1993).

⁴ See id.

b. Notification to Justice Department and FTC

The rule-of-reason and attorneys' fees provisions of the NCRPA automatically apply to all joint ventures and SDOs covered by the Act. However, eligibility for the Act's detrebling provision depends on the filing of a notification with the federal antitrust enforcement agencies. In order to obtain damage protection, any party to a joint venture covered by the Act may, not later than 90 days after entering into a written agreement to form the venture, file simultaneously with the Department of Justice and the Federal Trade Commission a written notification disclosing the identities of all parties to the venture and the nature and objectives of the venture. In the case of a joint venture one of whose purposes is the production of a product, process, or service, the notification must contain additional information: the nationality of all parties and the identity and nationality of all persons who control any party to the venture, whether separately or with one or more other persons acting as a group for the purpose of controlling such party. Notifications by SDOs must be filed within 90 days after commencing a standards development activity engaged in for the purpose of developing or promulgating a voluntary consensus standard, and must disclose the name and principal place of business of the SDO as well as documents showing the nature and scope of its standards development activity. An original and one copy of the notification, along with copies of a proposed Federal Register notice, must be filed with the Department, and one copy must be filed with the FTC. Such additional notifications as are appropriate to extend the Act's protection to new or different activities undertaken by a joint venture or SDO, or to disclose changes in membership of a joint venture, also must be filed. In order to maintain the protection of the Act, such supplemental notifications must be filed within 90 days of the change prompting the notification.

Notifications filed under the Act by joint ventures should make clear the identity of all parties to the venture. The list of parties should include "the real parties in interest."⁵ Notifications should also include a description of the nature and objectives of the venture, including a concise statement of its purposes. Parties filing notifications of joint ventures for production should state clearly that a purpose of their venture is production. They should also provide the nationality of all parties and the identity and nationality of all persons controlling such parties. The meaning of "control" of any party is intended to mean having the power to direct the management or policies of a person. This controlling influence may be exercised either directly or indirectly and the means used can vary. For example, it may be exercised through the ownership of voting securities, through a

⁵ Joint Explanatory Statement of the Committee of Conference on S. 1841, H.R. Rep. No. 98-1044, at 19 (1984).

contractual right, or through participation on the board of directors.⁶ In the case of a corporation, parties should provide the name, place of incorporation and location of principal executive offices. In the case of an unincorporated firm, comparable identifying information should be provided.⁷ Notifications filed by SDOs should provide the name and principal place of business of the organization, and should include documents showing the nature and scope of the standards development activities for which protection is being sought.

In general, the manner and extent of the notification is left to the submitting entities; they are to exercise their own discretion in determining the quantity and form of the information required adequately to describe the nature and objectives of their venture⁸ or the nature and scope of their standards development activities. Parties should be aware, however, that the damage protection of the Act is dependent on the adequacy of their notification. All written notifications filed pursuant to the Act should be delivered to each of the following offices:

Department of Justice
Antitrust Division
Premerger Notification Unit
Patrick Henry Building
601 D Street, N.W.
Room 10-013
Washington, DC 20530
(For FedEx, use Zip Code 20004)

Evaluation Office
Bureau of Competition
Federal Trade Commission
6th & Pennsylvania Ave., N.W.
Room 392
Washington, DC 20580

c. Review by Section

The Antitrust Division has certain responsibilities under the NCRPA, including receipt of parties' original and supplemental notifications of their joint venture and standards development activities and publication of Federal Register notices describing joint ventures and SDOs that elect to file notifications under section 6 of the Act.

Once a party submits a notification under the Act, it is date-stamped and recorded. A copy of the notice is then forwarded to the appropriate section for immediate review. NCRPA notifications are reviewed for two purposes. The first is to determine whether

⁶ See H.R. Rep. No. 103-94, at 19 (1993); S. Rep. No. 103-51, at 11 (1993).

⁷ See S. Rep. No. 103-51, at 13 (1993).

⁸ See H.R. Rep. No. 98-1044, at 18-19 (1984).

the notification discloses information of antitrust concern that merits the opening of a preliminary inquiry into the activities of the joint venture or SDO. The second purpose is to permit the preparation of a Federal Register notice that will provide the joint venture or SDO protection from treble damages. (The preparation and publication of the Federal Register notice proceeds regardless of whether a preliminary inquiry is begun.) For this latter purpose, the section reviews the notification expeditiously to determine whether it adequately identifies, for a joint venture, the parties to the venture and the venture's nature and objectives or, for a SDO, the name and principal place of business of the organization and the nature and scope of its activities. Although the legislative history indicates that the extent of the disclosure in the notification is largely up to the joint venture or SDO, sufficient information must be provided to enable the Department to publish the Federal Register notice described below. If there is doubt as to the adequacy of the notification, the section staff should promptly contact the Premerger Notification Unit. Because only conduct that is within the scope of a notification that has been filed under section 6(a) of the Act⁹ receives protection from treble-damage liability,¹⁰ persons providing information to the antitrust enforcement agencies for the purpose of obtaining or extending the protections of the NCRPA should always do so in accordance with the statutory requirements.

All information and documentary material submitted as part of a notification filed under the Act, as well as all other information obtained by the Department or FTC in the course of any investigation, administrative proceeding, or case with respect to a potential violation of the antitrust laws by a joint venture or SDO with respect to which such notification was filed, is exempt from disclosure under the Freedom of Information Act and may not be made publicly available except in a judicial or administrative proceeding in which such information and material is subject to a protective order.¹¹ Thus, all notifications should be held strictly confidential.

(i) Original Notifications

Notifications filed under the NCRPA by joint ventures must include the identities of all parties to the venture and a description of the nature and objectives of the venture, including a concise statement of its purpose. Organizations that are parties to joint ventures for research and development only should be identified by name and the location of their principal executive offices (city and state). Notifications concerning joint ventures for production should state clearly that a purpose of their venture is production,

⁹ 15 U.S.C. § 4305(a).

¹⁰ See 15 U.S.C. § 4303(a).

¹¹ See 15 U.S.C. § 4305(d).

and must also provide the nationality of all parties and the identity and nationality of all persons controlling such parties. Organizations that are parties (or persons controlling parties) to joint ventures involving production should be identified, in the case of a corporation, by providing the name, place of incorporation (the state of incorporation if the corporation is domestic and the country of incorporation if the corporation is foreign), and location of principal executive offices. In the case of an unincorporated firm, comparable identifying information must be provided. Notifications submitted by SDOs must disclose the name and principal place of business of the SDO and provide documents showing the nature and scope of the organizations standards development activities. If, after consulting with the Premerger Notification Unit/FTC Liaison Office, a determination is made that the required information has not been submitted, filers should be informed as promptly as possible that their notification is not sufficient to qualify for the protections of the Act and that a Federal Register notice will not be published until a proper notification has been submitted.

(ii) Supplemental Notifications

Notifications may also be filed to preserve or extend the protections of the NCRPA to existing ventures or SDOs whose activities have changed or, with respect to joint ventures, whose membership has changed, since the original notification. Supplemental notifications need only reflect the changes to the venture or SDO being disclosed (e.g., identify the parties being added to or dropped from a joint venture) and need not repeat information that has been disclosed in prior notifications. Thus, supplemental notifications should be reviewed in conjunction with previous filings to ensure that changes to either the parties or purposes disclosed in prior notifications do not now raise antitrust concerns. Federal Register notices are prepared for supplemental notifications in the same manner as for original notifications.

d. Preparation of the Federal Register Notice

The Act provides that the Department of Justice or the FTC shall, not later than 30 days after receiving a notification, publish in the Federal Register a notice that identifies the parties to a joint venture and describes in general terms the venture's area of planned activity, or that identifies a SDO engaged in standards development activity and describes such activity in general terms.¹² The Division has assumed the responsibility of publishing notices in the Federal Register for all notifications filed under the NCRPA. Parties filing notifications should submit a draft Federal Register notice along with their notification. Regardless of whether the parties have done so, it is the responsibility of the staff to prepare the actual Federal Register notice. Prompt preparation and publication of

¹² 15 U.S.C. § 4305(b).

the notice is required. The staff must keep in mind that both the provisions of the NCRPA and its legislative history indicate concern that competitors not have access to confidential details that a party may wish to provide in its notification, but that need not be made public in order to describe the activities of a joint venture or SDO.

(i) Sample Federal Register Notice for Joint Ventures

U.S. Department of Justice
Antitrust Division

NOTICE PURSUANT TO THE NATIONAL COOPERATIVE
RESEARCH AND PRODUCTION ACT OF 1993 -- [NAME OF
JOINT VENTURE]

Notice is hereby given that, on [INSERT DATE NOTIFICATION RECEIVED AND STAMPED IN PREMERGER NOTIFICATION UNIT], pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 et seq. ("the Act"), [JOINT VENTURE] has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties are: [LIST PARTIES' NAMES, CITY, AND STATE (USING U.S. POSTAL SERVICE TWO LETTER ABBREVIATION) OR COUNTRY (IN ALL CAPITAL LETTERS) OF PARTIES' PRINCIPAL PLACE OF BUSINESS IN ONE CONTINUOUS PARAGRAPH, SEPARATING EACH WITH A SEMICOLON].

The [JOINT VENTURE]'s general area(s) of planned activity is/are: [DESCRIBE GENERAL AREA OF PLANNED ACTIVITY OF THE JOINT VENTURE].

[DESIRABLE BUT NOT REQUIRED IS THE IDENTIFICATION OF AN INDIVIDUAL FROM WHOM ADDITIONAL INFORMATION CONCERNING THE VENTURE CAN BE OBTAINED.]

Deputy Director of Operations
Antitrust Division

(ii) Sample Federal Register Notice for SDOs

U.S. Department of Justice
Antitrust Division

NOTICE PURSUANT TO THE NATIONAL COOPERATIVE RESEARCH
AND PRODUCTION ACT OF 1993 -- [NAME OF STANDARDS
DEVELOPMENT ORGANIZATION]

Notice is hereby given that, on [INSERT DATE NOTIFICATION RECEIVED AND STAMPED IN PREMERGER NOTIFICATION UNIT], pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 et seq. ("the Act"), [STANDARDS DEVELOPMENT ORGANIZATION] has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of

invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the name and principal place of business of the standards development organization is: [NAME OF THE STANDARDS DEVELOPMENT ORGANIZATION, CITY, AND EITHER THE TWO LETTER U.S. POSTAL SERVICE ABBREVIATION FOR THE STATE OR, IF A FOREIGN-LOCATED ORGANIZATION, THE NAME OF THE COUNTRY IN ALL CAPITAL LETTERS]. The nature and scope of [STANDARDS DEVELOPMENT ORGANIZATION]'s standards development activities are: [PROVIDE A DESCRIPTION, IN GENERAL TERMS, OF THE ORGANIZATION'S STANDARDS DEVELOPMENT ACTIVITIES].

[DESIRABLE BUT NOT REQUIRED IS THE IDENTIFICATION OF AN INDIVIDUAL FROM WHOM ADDITIONAL INFORMATION CONCERNING THE ORGANIZATION CAN BE OBTAINED.]

Deputy Director of Operations
Antitrust Division

e. Notice to Parties

The Act requires that the proposed Federal Register notice be made available to the parties to a venture, or to a standards development organization, as the case may be, for review prior to its publication. Thus, after the notice is prepared, it should be sent to the parties or organization for review as expeditiously as possible. This must be done in writing, and appropriate records kept. It is acceptable to fax the notice to the parties or to the organization.

Any party filing a notification on behalf of a joint venture is invited to include a statement to the effect that it has been authorized to review the Federal Register notice on behalf of all venturers, along with the name and contact information for the person so authorized. Otherwise, the notification must include the names and contact information for all parties to whom the notice should be made available for review. A notification on behalf of a SDO should provide the name and contact information of an individual who is authorized to review the Federal Register notice on behalf of the organization.

In view of the fact that the Federal Register notice must be published within 30 days of the Division's receipt of notification, parties are asked to express any objections they have to the proposed notice no later than two working days after receiving it. An effort should be made to resolve any such objections, keeping in mind the requirements of the Act and the purpose of the notice. If the Division and the parties are unable to agree on the contents of the Federal Register notice, the parties have the option of withdrawing their notification, but must do so before publication of the notice.

(i) Sample Transmittal Letter

[NAME AND ADDRESS OF NOTIFIER]

Re: National Cooperative Research and Production Act of 1993 -- [NAME OF JOINT VENTURE OR SDO]

Enclosed for your review is a proposed Federal Register notice regarding [NAME OF JOINT VENTURE OR SDO]. The statutory deadlines on these matters require a fairly quick turn around on your part. Accordingly, please contact us by telephone or by fax no later than two working days after receipt of the proposed notice if you have any objections to it, or if you want to discuss it further. If we do not hear from you within that time, we will proceed with providing public notice in the Federal Register. Please call me [phone number] or [Chief or Assistant Chief and phone number] with any questions or problems.

Sincerely,

Enclosure

f. Review and Publication of Notice

After the Federal Register notice has been prepared and reviewed by the parties or SDO, it is forwarded to the Premerger Notification Unit/FTC Liaison Office along with a memorandum setting forth the date on which the notification was received by the Division, a copy of the letter or letters making the notice available to the parties or SDO, and a description of any problems or objections regarding contents. The notice and memorandum should then be forwarded as soon as possible, but no more than 14 calendar days after the section has received the notification from the Premerger Notification Unit/FTC Liaison Office. After review and approval by the Office of Operations, the Premerger Notification Unit/FTC Liaison Office forwards the notice to the Federal Register for publication, and arranges for permanent records of the notifications and Federal Register notices to be maintained.